IN THE

Supreme Court of the United States

77-1521

No. Misc.

GERALD MARKER, *et al.*,

Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, INC., *et al.*,

Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., *et al.*,

Respondents (Defendants).

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

AND

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 24, 1978

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Now come the Petitioners and respectfully move this Court for leave to file the annexed Petition for Writ of Certiorari under Section 1651 of Title 28, United States Code, which Petition is directed to the United States Court

of Appeals for the District of Columbia Circuit, to review the Order of that Court entered December 21, 1977 and upon which rehearing was denied on January 23, 1978, all as more particularly described in the Petition, and for such other and further relief as may be just and proper.

Dated: April 24, 1978

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, pursuant to 28 U.S.C. 1651(a), pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered on December 21, 1977, and upon which rehearing was denied on January 23, 1978. The earlier Order struck Petitioner's "Brief for Intervenors-Appellees", filed and served pursuant to Rules 28 and 31, F.R.A.P. on November 16, 1977.

OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit did not write any opinion relevant to this Petition. The subject Orders are set forth in the simultaneously submitted and separate Appendix, pp. 1a and 3a (hereinafter "App." followed by the page number).

JURISDICTION TO REVIEW

The Court of Appeals Order denying rehearing of the Court of Appeals was entered on January 23, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a)[1] or, in the alternative, pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rules of Appellate Procedure ("F.R.A.P.") Rules 28 and 31 and specifically, Rules 28(b), 28(c), 28(h), and 31(a) thereof. These two Rules appear in full at App. 54a and 57a, respectively.

[1]See, House v. Mayo, 324 U.S. 42 (1945); Steffler v. United States, 319 U.S. 38 (1943); McClellan v. Carland, 217 U.S. 268 (1909).; DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1910); and United States Alkali Export Association, Inc. v. United States, 325 U.S. 196 (1945). See also Head v. California, 374 U.S. 509 (1963).

QUESTIONS PRESENTED

1. By striking Petitioners' "Brief for Intervenors-Appellees", did the Court of Appeals violate Rules 28 and 31, F.R.A.P., thus precluding Petitioners (as Appellees) from answering the arguments set forth in Appellants' Brief?

2. Where a full panel of the Court of Appeals had on December 17, 1976, unanimously and in all respects affirmed the District Court's Order granting Petitioners intervention, did a two-judge panel of the Court below (including *only* one judge of the original panel) have power, on December 21, 1977, during the pendancy of no relevant appeal, to modify and curtail both the District Court's intervention order and the full panel's affirmance thereof?

3. By striking said Brief (filed pursuant to Rules 28 and 31, F.R.A.P.) did the Court of Appeals deprive Petitioners (as Appellees) of procedural due process under the Fifth Amendment to the Constitution of the United States?

4. By striking said Brief, did the Court of Appeals impair or frustrate the future jurisdiction of this Court?

STATEMENT OF THE CASE

A. *The Underlying Complaint.* On May 1, 1973, ten international and national unions, each a member of the American Federation of Labor-Congress Industrial Organizations, filed in the United States District Court of the District of Columbia a complaint against the National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") and the National Right to Work Committee ("Committee"), both hereinafter sometimes referred to as defendants. The complaint, an amended complaint and a second amended complaint requested in two counts injunc-

tive and declaratory relief and compensatory damages for alleged violations of the Labor Management Reporting and Disclosure Act ("LMRDA"), specifically Sections 101(a)-(4) and 203(b) thereof [29 U.S.C. §411(a)(4) and 29 U.S.C. §433(b)]. Jurisdiction of the Distict Court was claimed under 28 U.S.C. §2201 (declaratory relief), 28 U.S.C. §2202 (relief ancillary to declaratory relief), 29 U.S.C. §412 (relief for persons aggrieved by infringement of their rights under LMRDA), 28 U.S.C. §1331 (Federal questions involving more than $10,000.00) and 28 U.S.C. §1337 (civil actions arising under Acts of Congress regulating commerce).

The First Count of the complaint sought to prevent Foundation from continuing legal aid to Petitioners, among others, in actions against unions in other jurisdictions. Without such aid, Petitioners would not be able to finance their meritorious actions in other courts. That count of the second amended complaint relies entirely upon the second proviso in Section 101(a)(4) LMRDA. Petitioners' interest in the litigation is confined to that first count. On January 9, 1976, Petitioners, numbering sixteen, moved, in the District Court, to intervene as Defendants. All but two of the movants alleged receipt of Foundation's legal aid, and the other two were then in the process of requesting such aid, and have since received it.

B. *Judicial History Immediately Relevant to this* Petitioners permissive intervention. (App. 51a.) That Order was affirmed by the Court below (App. 49a). It explicitly limited intervention to two purposes:
explicitly limited intervention to two purposes:

> [1] for the limited purpose of submitting evidence on the question of whether the plaintiffs set forth in paragraph ten of the amended complaint were at the time of these actions union-member employees and

> [2] *for the purpose of submitting briefs on legal questions extant.* [Emphasis supplied.]

Petitioners rely here on the second purpose.

Pursuant to invitation of the District Court to all parties, Petitioners submitted lengthy Memoranda[2] of law on May 3 and May 10, 1977. No objection to the filing of such Memoranda was made by either the District Court or Plaintiffs' counsel.

On June 2, 1977, the District Court filed its Order and Opinion (App. 38a and 21a, respectively) granting summary judgment against plaintiff unions. This precipitated three appeals: one by Petitioners (Docket No. 77-1739) as Intervenors-Appellants; one by Plaintiffs-Appellants (Docket No. 77-1766); and one by Defendants-Appellants (Docket No. 77-1767). (App. 13a, 19a, and 9a and 6a respectively). Petitioners (as Intervenors) filed their Notice of Appeal on July 5, 1977; it was given *Docket No. 77-1739*, a number applicable to Petitioners *only* as Intervenors-*Appellants.* Subsequently, the plaintiff unions filed a Motion to strike Intervenors' Notice of Appeal. On September 26, 1977, the Court of Appeals, *per curiam*, entered in Docket No. 77-1739 its Order on that Motion:

> Upon consideration of appellees' [plaintiff unions'] motion to dismiss [petitioners'] appeal, of the responses filed with respect thereto, and it appearing that these appeals draw into question the constitutionality of 29 U.S.C. §411(a)(4), it is
>
> ORDERED by the Court that appellees' aforesaid motion is granted except as to the matters stated on page five of intervenors' notice of appeal filed in the District Court on July 5, 1977 which will be the sole matters to be briefed [by Petitioners as Appellants] in this appeal, and, it is

[2]Intervenors confined their Memoranda of Law in that Court to Count One of the Second Amended Complaint, having no interest in Count Two or in Defendants' Counterclaim.

FURTHER ORDERED by the Court *sua sponte* that the instant case [No. 77-1739] and numbers 77-1766 and 77-1767 are consolidated for consideration of the merits.

The Clerk is directed to send a certified copy of this order to the Attorney General of the United States pursuant to Rule 44 of the Federal Rules of Appellate Procedure.

On November 16, 1977, Petitioners served and filed their "Brief of Intervenors-Appellees". The plaintiff unions filed a motion to strike that Brief.

On December 21, 1977, the Court below in *Docket No. 77-1739* (wherein Petitioners are *appellants*, as distinguished from Docket No. 77-1766 and 77-1767, where Intervenors are *appellees*) entered its *per curiam* Order:

Upon consideration of the [plaintiff unions'] motion to strike the brief of Intervenors-appellees [Petitioners] filed in number 77-1739, of the responses filed with respect thereto, and of the Court having *sua sponte* considered and rejected the additional submissions as a brief of *amicus curiae*, it is

ORDERED by the Court that the motion to strike is granted and counsel shall correct the brief, within ten days from the date of this order, to comply with the order filed herein on September 26, 1977.

Petitioners then filed a Motion for Rehearing, Stay and Clarification upon the Order of December 21. On January 23, 1978, the Court below filed its *per curiam* Order (captioned in Docket Nos. 77-1739, 77-1766 and 77-1767) denying Petitioners' Motion for Rehearing, etc.:

[3]While Petitioners' printed Brief below agreed with the District Court's holding that, as applied by plaintiff unions, 29 U.S.C. §411(a)(4) is unconstitutional, most of Petitioners' arguments contended that summary judgment in favor of Defendants was justified on non-constitutional grounds, particularly grounds of statutory construction.

Counsel for Intervenors' (Gerald Marker, *et al.*) have filed a motion for rehearing, stay and clarification, and exhibits thereto. On consideration thereof, it is

ORDERED by the Court that the Motion for rehearing, stay and clarification is denied. Counsel for intervenors/appellants/cross-appellees [Petitioners] Gerald Marker, et al., shall, within seven days of the date of this order, file a brief addressing only the single issue specified on page 5 of their notice of appeal, III J.A. 951, in lieu of the brief stricken on December 21, 1977. The Court will not entertain an application for stay of mandate or other dilatory pleading. Counsel will file the brief specified, in order to comply with the order of this Court, whatever other pleadings counsel may file.

Counsel for Petitioners did, on January 30, 1978, "file the brief specified", without prejudice to their right to file this Petition. That limited Brief addressed only the subject mandated by the Court of Appeals, and it was filed and served without subsequent objection from any party.

REASONS FOR GRANTING THE WRIT

I. National Importance of the Case

Petitioners' *interest* in this case has been settled by the District Court's intervention Order and its affirmance by the Court below (App. 51a and 49a). Obviously Petitioners stand to lose Foundation's legal aid if the Amended Complaint is sustained on appeal. But Petitioners contend for a decision serviceable as a precedent for all similarly situated employees and union members[4] in need of legal aid as well as for themselves. Thus, issues in which all employees and union members have a vital stake predominate in this case, which personally affects Petitioners as well as thousands of union members and employees unable to afford the cost of litigations against unions. The case is of national importance because it affects these many persons and the just administration of the federal court system and the national labor laws. *United States v. Ruzicka*, 329 U.S. 287 (1946). Further, the legal issues here are unprecedented, important questions of first impression.

[4]The real, primary cause which initiated this litigation was the nationwide existence of (i) dissenting union members, (ii) employees who reject union membership, and (iii) employees who object to paying for the support of unions (which, after all, represent about twenty percent of all U.S. employees). If such dissidents from unionism did not exist, this case could not have arisen. At bottom and as the Complaint shows, the basic controversy in this case is not confined to the Plaintiffs and Defendants named in the Complaint. This controversy is merely a symptom of prior deeper disputes between plaintiff unions and dissident union members aided by Defendants.

II. Abrogation by Court Below of Rules 28 and 31, Federal Rules of Appellate Procedure.

Petitioners as intervenors are *parties* in this case. Rule 24, F.R.C.P., provides the procedural device whereby a stranger to a litigation can present a claim or defense therein and become a *party* for that purpose.[5] By striking Petitioners' Brief, the Court of Appeals' Order divested Petitioners of their rights both as *appellees* and as *parties*, rendering them voiceless in the face of appellant unions. The Court below struck Petitioners' Brief more than a year after the time to appeal the intervention Order of the District Court had expired, and more than a year after the Court of Appeals itself had unanimously and in all respects[6] affirmed that District Court Order.

In so doing, the Court below devalued Petitioners' status and role as intervenors and parties, despite Rules 28 and 31, F.R.A.P., which Petitioners had called to its attention, and which as relevant read:

> Rule 28
>
> (b) *Brief of the Appellee.* The brief of the appellee shall confirm to the requirements of subdivision (a)(1)-(4) . . . .

[5]International Union, Local 289 v. Scofield, 382 U.S. 205 (1965); Sixty-Seventh Minnesota Senate v Beens, 406 U.S. 187 (1972); Fishgold v. Sullivan Drydock Co. Repair Corp., 328 U.S. 275 (1945); Wolpe v. Poretsky, 79 App. D.C. 141, 44 F.2d 505 (1944); Williams v. Morgan, 111 U.S. 684 (1884).

[6]Even this Court refuses to revise a district court's unabused discretion concerning intervention. Re Engelhard & Sons, 231 U.S. 646 (1914). A court of appeals may not use an extraordinary remedy to control the trial court's properly exercised discretion. Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964); Employers Reinsurance Corp. v. Bryant, 299 U.S. 374 (1936).

(c) *Reply Brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal . . . .

(h) *Briefs in Cases Involving Cross Appeals.* If a cross appeal is filed the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders, the brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

Rule 31

(a) *Time for Serving and Filing Briefs.* The appellant shall serve and file his brief within 40 days. . . . The appellee shall serve and file his brief within 30 days after service of the brief of appellant. . . .

Petitioners complied with these Rules. In striking Petitioners' Brief, the Court below patently violated them, especially Rule 28. It vetoed Petitioners' "brief of the appellee" including their "answer to the brief of the appellant[s]" and their corrective restatement of Appellants' issues. The unions' and Defendants' briefs do *not* contain the entire "argument involved in the appeal" below; Petitioners' "Brief for Intervenors-Appellees" contains many additional arguments with respect to the first cause of action. To bar Petitioners' "issues and argument" and their "answer", as did the Court below, is to truncate the appeal below and to *piecemeal it*,[7] to the prejudice of adequate consideration of

[7]Section 46(c) of the Judicial Code ["Cases and controversies shall be heard and determined by a court or division of not more than three judges. . ."] contemplates the *entire* "case" (as a proper judicial unit) carried to appeal, not arbitrarily selected *parts* thereof. Congress and the *(continued)*

the *whole* case.

Courts have a duty to comply with valid statutes, and insofar as they do *not* comply, they lack authority and abuse their discretion. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

The Court below, by striking Petitioners' Brief, violated the "usages and principles of law" (28 U.S.C. §1651). Until this case, all courts of appeals have consistently accepted briefs from intervenors[8]. No court has ever before rejected an intervenor's brief in circumstances analogous to those obtaining in this unique case. The Court below is, in this respect, out of step with all other courts of appeals in the United States. *Goldlawr, Inc. v. Herman*, 369 U.S. 456 (1962).

(footnote continued from preceding page)

tradition of judicial administration forbid piecemeal litigation. Will v. United States, 389 U.S. 90 (1967); Parr v. United States, 315 U.S. 513 (1956); Cobbledick v. United Stocks, 309 U.S. 323 (1940); Kerr v. U.S. District Court, 426 U.S. 394, (1976); Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943); Bankers Life & Cas. Co. v. Holland, 34 U.S. 379 (1952).

[8]Ex parte Jordan, 94 U.S. 248 (1876); Gumbel v. Pitkin, 113 Picker Min. & Smelting Co., 325 U.S. 335 (1944); and see Footnote numbered Five (5), *supra.*

III. Abdication of Judicial Function By the Court of Appeals.

In striking Petitioners' Brief, the Court below *pro tanto* abdicated its appellate judicial function. Rule 24, F.R.C.P., does not, in the circumstances, authorize it to give Intervenors less than the District Court in the proper exercise of discretion gave them by an Order affirmed by the Court below. The Judicial Code, 28 U.S.C. §46(c) required the Court below to take, and it did take, the "case or controversy", initiated by the notices of appeal. But it took only the part of that "case or controversy" in which the original parties were interested, to the utter neglect of Petitioners as parties and as appellees. To the extent that it rejected Petitioners' Brief, there was an unauthorized renunciation of appellate function.[9]

The full panel of the Court below which on December 17, 1976, affirmed, unanimously and in all respects, the District Court's Order filed March 8, 1976 (allowing Petitioners to intervene in this case) comprised Judges Bazelon, McKinnon and Leventhal. The two-judge panel which unanimously struck Petitioners' Brief comprised Judges McGowan and Leventhal.

None of the original parties at any time or in any way challenged or sought review or reargument of the affirmance of December 17, 1976. The time for review or reargument had long since expired. Thus, the law of the case, firmly established by the District Court and the Court below, is that Petitioners are permissive intervenors (and therefore, *parties*) to whom two courts explicitly gave the right to

[9]See, Connor v. Coleman, 425 U.S. 675 (1976); Ex parte Harley Davidson Motor Co., 259 U.S. 414 (1921); Ex parte Kawato, 317 U.S. 69 (1942).

submit "briefs on the legal questions extant". (App. 53a.)[10] The two-judge panel confiscated that right by the Order here reviewed. Petitioners are unable to discover any justification for such appellate court procedure or any precedent disclosing similar conduct by any Court of Appeals.

IV. Impairment of Future Jurisdiction of This Court.

By striking Petitioners' Brief, the Court below impaired or frustrated the future appellate jurisdiction of this Court. It is the function of Courts of Appeals, especially in cases which (like this one) will inevitably be presented to this Court for review, to prevent obstacles to this Court's jurisdiction and to consider and to rule on all relevant legal issues, properly raised below, which are likely to be considered by this Court. *McClellan v. Carland,* 217 U.S. 268 (1909); *Ex parte Abdu.*, 247 U.S. 27 (1917); *Re Buder,* 271 U.S. 461 (1925);

[10]See transcript of hearing by the District Cout on March 8, 1976 (App. 53a); transcript of the status hearing on April 26, 1977 (App. 41a *et seq.*); Petitioners' Notice of Appeal filed July 5, 1977 below in Docket No. 77-1739 (App. 13a); the Court of Appeals' Order filed September 26, 1977, which recognizes Petitioners' status as appellants (App. 4a); Plaintiffs' Notice of Appeal filed July 1, 1977, in Docket No. 77-1766, which designates Petitioners as Intervenors-Appellees (App. 19a); Defendants' Notice of Appeal filed July 15, 1977 in Docket No. 77-1767 below, which also designates Petitioners as Intervenors-Appellees (App. 6a and 9a); the Court of Appeals Order filed December 21, 1977 in Docket No. 77-1739, wherein the Court refers to plaintiffs' motion to strike the brief of the intervenors-appellees, grants that motion and refuses, *sua sponte*, to allow Petitioners the right to submit its brief as amicus curiae, (App. 3a). Even plaintiff unions designated their motion to strike the brief of Petitioners as a "Motion to Strike the Brief of Intervenors-*Appellees*", and later filed a "Reply Memorandum in support of motion to strike the brief for Intervenors-*Appellees*". [Emphasis supplied.] In short, Petitioners are recognized as appellees, and as appellants.

United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196, 202, 203 (1945). Only in this way can intermediate appellate courts properly aid the future jurisdiction of this Court and present to it the fruits of full study and consideration. The Order to which Petitioners object obstructs *complete* consideration of this case on its merits.[11] No valid reason exists for refusal by the Court below to hear Petitioners. *Ex parte United States*, 287 U.S. 241 (1932).

It is incumbent upon the Court below, both as the bridge between district courts and this Court, or as the often final appellate court, to obtain from *all parties* their studied contentions concerning *all* relevant legal issues raised below. This is a requirement of fairness of hearing.[12]

[11]The "Brief of Intervenors-Appellees" (stricken by the court below) probed *fifteen legal issues.* These were classified, listed and numbered in that Brief under the heading, "Statement of Issues Presented for Review" (pp. 1-3). The first group of *four* issues was classified as "Constitutional Issues" (p. 1). Only issue numbered "(1)" in that Group I was covered (in different ways) by both Petitioners and the original parties.

The second group of *seven* issues was denominated "Issues of Statutory Construction" in Petitioners' Brief. None of these was addressed by either plaintiffs or defendants.

The third group of *four* issues was called by Petitioners "Factual Issues" (pp. 2-3). Each of these is a legal question dealing with the absence of substantial evidence in the record to support crucial allegations in the first cause of action set forth in the Amended Complaint. Defendants' brief did cover three of these four legal, non-constitutional issues.

[12]This Court has said:

> *** The purpose of the judicial review is *** to secure a just result with a minimum of technical requirements ***.
>
> To allow intervention *** in the first appellate review proceeding is to avoid "unnecessary duplication of proceedings", and to adhere to the goal of obtaining "a just result with a

(continued)

Unless this is done, the Court below thwarts the possible future jurisdiction of this Court by a determination which fails to reflect adequate consideration of all substantial issues in the case.

Furthermore, remand to the District Court, in the event the constitutional arguments of the original parties fail, would still be unnecessary, if Petitioners' views on statutory construction were to prevail. Petitioners differ emphatically from Defendants, who, in their "Reply Brief for Defendants-Appellees and in Support of their Cross-Appeal", seem to argue that the only proper alternative to an affirmance based on Defendants' arguments is a remand. On the contrary, Petitioners urge that affirmance on *their* arguments (not made in any other brief in this case) is a valid alternative to remand.

(footnote continued from proceeding page)

> minimum of technical requirements." ***
>
> Permitting intervention also insures fairness to the *** intervenor. If intervention is permitted, the parties *** are able to present their arguments on the issues to a reviewing court which has not crystallized its views. *** the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the *** intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of stare decisis ***. [International Union, Local 289 v. Scofield, 382 U.S. 205, 214 (1965).]

Thus, fairness requires that all parties be heard. Davis v. Merchantville Trust Co., 152 U.S. 590 (1893); Shields v. Utah Idaho C.R. Co., 305 U.S. 177 (1938); Sung v. McGrath, 399 U.S. 33 (1949).

V. Petitioners' Hobson's Choice: Res Judicata or Appeal.

Previously in this litigation, despite their status as Interveners for limited purposes only, Petitioners had submitted briefs on the legal questions extant in the first count of the Complaint. Their participation had been guided by the District Court's Order permitting intervention, and the affirmance of that Order by the Court of Appeals. The recent Order by the Court below striking Petitioners' reply brief and further limiting Petitioners' role creates confusion concerning the *res judicata* effect of this litigation on Petitioners.

An intervenor is bound by future orders pertaining to the matter for which intervention was originally permitted. The intervenor must therefore appeal orders adverse to his interests, and cannot merely amend his petition of intervention to ask for additional relief. *Commercial Electric Supply Co. v. Curtis*, 288 F. 657 (8th Cir. 1923), cert. den. 264 U.S. 709 (1923). The intervenor is subject to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party. *Alexander v. Hillman*, 296 U.S. 222 (1935).

This is not a case in which the petitioner seeks to participate in an appeal simply to establish a precedent applicable to itself, as in *Boston Tow Boat Co. v. U.S.*, 321 U.S. 632 (1944). Here, the effect of the litigation upon intervenor is not simply stare decisis, but res judicata. Therefore, the interest of Petitioners is comparable to that of the intervenor union in *Fishgold v. Sullivan Drydock and Corp.*, 328 U.S. 275 (1946), where this Court's interpretation of a collective bargaining agreement was final and binding. The interpretation of §101(a)(4) of the LMRDA

[29 U.S.C. §411(a)(4)] by the Court below will bind intervenors, as well as plaintiffs and defendants. Individuals financed by the Defendant Foundation are threatened with loss of that support if the Court of Appeals reverses the District Court decision. Thus, Petitioners meet the definition of an "aggrieved party", entitled to participate in an appeal of the lower court's decision. See, *SEC v. U.S. Realty and Improvement Co.*, 310 U.S. 433 (1940); *Port of New York Authority v. Baker, Watts and Co.*, 129 U.S. App. D.C. 173, 392 F.2d 497 (1968). If their participation is prohibited by a revised interpretation of the scope of their intervention, Petitioners will be denied the hearing fundamental to adjudication of their interest, and yet be bound by the result.

VI. Violation of Procedural Due Process by the Court of Appeals.

In foisting this Hobson's choice upon Petitioners, and in faling to allow compliance with Rule 28 and Rule 31, F.R.A.P., the Court of Appeals violated the procedural due process required by the Fifth Amendment to the United States Constitution. This Court has often ruled that parties aggrieved by governmental action are constitutionally entitled to be heard meaningfully: "at a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 515, 552 (1965). Petitioners were denuded of their right as parties-appellees to be heard on the merits of the unions' appeal. Petitioners' Brief was stricken, not on the merits, but arbitrarily and summarily by sheer non-compliance with the F.R.A.P. and by anullment of the District Court's affirmed Order (App. 49a) granting Petitioners the right to brief this

important case. Thus, a "substantial, basic and undecided question" is here presented. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In a "case or controversy" under 28 U.S.C. §46(c), no party or intervenor can be heard effectively *except by brief.* To punish Petitioners, by striking their Brief, for doing what the law allows is patently undue process. *North Carolina v. Pearce,* 395 U.S. 711 (1969).

Moreover, once the Court of Appeals filed its Order affirming, on December 17, 1976 (App. 49a), the District Court's Order of March 8, 1976 (allowing Petitioners to become intervenors), any reversal, modification or partial nullification of that District Court's Order (App. 51a) became a matter beyond the appellate jurisdiction of the Court below, since Plaintiff Unions had failed or refused to appeal from the District Court's grant of permissive intervention to Petitioners. When the Court below issued its Order of December 21, 1977, it exercised unauthorized jurisdiction. *De Beers Consol. Mines, Ltd.*, 325 U.S. 212 (1944); *Will v. United States,* 389 U.S. 90 (1967). At the very least, the Court below failed to remain within its prescribed jurisdiction as an appellate Court.[13]

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[13]In re Chetwood, 164 U.S. 443 (1897); Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943); United States Alkali Export Ass'n., 325 U.S. 196 (1945); Re Winn, 213 U.S. 458 (1908); Re Buder, 271 U.S. 461 (1925).

It should also be noted that the Court below in effect censored Petitioners' Brief out of appellate consideration, thus violating free speech and free access to the courts, both rights protected by the First Amendment.

VII. Petitioners Have No Remedy Except By This Petition.

No appeal to the Court of Appeals is possible under the Order of that Court (App. 3a). There is no appeal from a court's non-compliance with statute. Petitioners' Motion for Rehearing by that Court was duly made and deined (App. 1a). Even if *arguendo*, appeal were possible, it would be valueless, because the Court below has, in effect, snuffed out Petitioners' arguments and issues at the very threshold and before Petitioners could utter meaningful appeal on the merits of the legal case which Petitioners can make against the first cause of action in the Amended Complaint. *McClellan v. Carland*, 217 U.S. 268 (1909). The Court below having disregarded Petitioners' rights as parties, the abuse of discretion is so aggravated and the absence of remedy is so obvious as to warrant the extraordinary writ which Petitioners seek. *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945).

Because the Court below has at no time written an opinion concerning Petitioners, the latter approached the writing of their papers for their motion below for rehearing with the frustration and thwarted importunity of the protagonist in Franz Kafka's novel, *The Castle.* They could then discover no rationale which justified the striking of their Brief. They are even more in that same quandrary after writing this Petition and after researching the relevant cases.

CONCLUSION

For the foregoing reasons, Petitioners' Motion for Issuance of a Writ of Certiorari should be granted to review the Orders aforesaid of the United States Court of Appeals for the District of Columbia Circuit. Should this Court consider Petitioners' request for extraordinary relief unnecessary, Petitioners respectfully pray that this Petition be treated as a petition for certiorari under the ruling made in *Head v. California*, 374 U.S. 509 (1963).

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